

AUG 29 1988

Decision 88 08 065 AUG 24 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
 for the purposes of considering)
 and determining minimum rates for)
 transportation of sand, rock,)
 gravel and related items in bulk,)
 in dump truck equipment between)
 points in California as provided in)
 Minimum Rate Tariff 7-A and the)
 revisions or reissues thereof.)

Case 5437, OSH 325
 (Filed April 17, 1985)
 Case 5437, OSH 323
 (Filed October 1, 1984)
 Case 5437, Pet. 329
 (Filed June 6, 1985)

And Related Matters.

Case 9819, OSH 75
 Case 9820, OSH 25
 (Filed April 17, 1985)
 Case 9819, Pet. 79
 Case 5432, Pet. 1060
 (Filed June 6, 1985)
 Case 9819, OSH 76
 Case 9820, OSH 27
 (Filed May 1, 1985)

OPINION

This consolidated proceeding is being conducted for the purpose of considering methods and procedures through which effective dump truck minimum rate policy can be established, administered, and tested in practice.

Thirty-three days of public hearings have been held since March 17, 1986. Several decisions have been issued thus far, notably Decision (D.) 86-08-030, which adopted various cost methodologies, and D.87-05-036, which adopted certain rules for future publication in the three minimum rate tariffs (MRT's) naming rates for transportation performed in dump truck equipment.

This decision relates to an appeal from a ruling of the assigned Administrative Law Judge (ALJ) on a motion made by the Center For Public Interest Law (CPIL), and to a Petition to Set Aside Submission filed by Yuba Trucking, Inc. (Yuba).

Appeal from Ruling

On December 17, 1987 CPIL filed a Motion in Limine for the exclusion of written and oral testimony concerning a labor cost study (LCS) prepared by the Commission's Transportation Division staff (Exhibits 59 and 60). The assigned ALJ, after conferring with the assigned Commissioner, issued a ruling on January 8, 1988 denying the CPIL motion and directing the staff to prepare revised exhibits from existing data showing labor rates for drivers paid solely on an hourly basis, i.e. excluding wages based upon percentages of revenues, thereby excising from the LCS certain data previously considered objectionable.

On February 26, 1988 CPIL orally presented a motion to strike certain exhibits already admitted into the record, and to exclude other exhibits offered but not yet admitted. The exhibits all relate to information contained in the LCS reflected in revised Exhibits 59 and 60. The ALJ denied the motion on March 1. On March 15, 1988 CPIL filed its appeal to the Commission from the ALJ ruling.

The thrust of the CPIL appeal generally is as follows:

1. The study is not admissible because it is irrelevant and not probative of anything.
2. The study has so few returns from carriers as to be unusable.
3. No tests were performed to establish the reliability of the study.
4. The study is not usable even for its original limited purpose of establishing territorial boundaries.
5. Data contained in the study is unreliable.

The appeal was supported by Yuba and by the Associated General Contractors of California (AGC). AGC supports the use of the LCS for determination of territorial boundaries, but not for ratemaking purposes. Replies to the CPIL appeal were filed by California Dump

Truck Owners Association (CDTOA), California Carriers Association (CCA), California Trucking Association (CTA), the Commission staff, and by Dennie Reed & Sons, Inc.

CDTOA/CCA in its reply to the CPIL appeal states that the ALJ ruling at issue is an interlocutory ruling which may not be appealed to the Commission, citing Rule 65 of the Commission's Rules of Practice and Procedure and the Commission's decision in Miles Tank Lines (1977) 81 CPUC 389. Miles concerned an appeal from the presiding officer's ruling denying a motion to quash subpoenas and for a protective order. The decision contained dictum stating that "the Commission does not ordinarily entertain or pass upon rulings of its presiding officers prior to a decision on the merits of a matter." (Emphasis added.) CDTOA/CCA is correct in referring us to Miles. In ordinary circumstances the general rule stated therein will be applied. However, Rule 65 provides that in extraordinary circumstances the presiding officer may refer a matter to the Commission for determination. The ALJ informed the parties during the conduct of hearings that the Commission would decide on the CPIL appeal. The appeal from the ALJ ruling in these circumstances is properly before the Commission.

Revised Exhibits 59 and 60 contain information received from Baldwin Contracting Company (Baldwin) a firm which held operating authority issued by this Commission, reported dump truck revenue to the Commission, and paid fees on that revenue. The company had reported that it had 239 dump truck drivers on its payroll. Baldwin's equipment coordinator, Ron Rogers, testified that his company performs only proprietary contracting operations, that it does no for-hire operations requiring operating authority from this Commission, and that the information supplied to the staff was erroneous. He stated that the company would soon apply to the Commission for a return of the fees paid. Rogers' testimony was unrefuted.

Because the LCS in its present form includes information received by the staff which has proven to be inappropriate, and of a volume to suggest that the end product contained in the study may be unduly skewed, we will direct the staff to again prepare revised exhibits which will exclude the Baldwin data. The resultant exhibits will reflect information usable only for the purpose intended, i.e. data to support the recommendation of the staff and other parties concerning appropriate territorial descriptions for publication in MRT 7-A. The revised exhibits should not be used to provide a basis for determining labor costs for ratemaking purposes.

CPIL's argument that the exhibits should not be admitted because they do not prove anything is without merit. There is a great deal of information contained in the exhibits showing that particular wage levels are paid in specific counties. After removal of the information concerning wages paid on a percentage of revenue basis, revised Exhibits 59 and 60 provided labor cost data on 4,166 driver employees in 56 of the 58 California counties. The removal of the data based on the 239 drivers erroneously reported by Baldwin will provide a reasonable basis for determining territorial descriptions to be published in MRT 7-A.

With respect to CPIL's allegation concerning the relevancy of the information contained in revised Exhibits 59 and 60, we refer the appellant to Section 210 of the California Evidence Code, defining "Relevant Evidence" as:

"evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action."

The LCS offered by the staff has been gathered from approximately 60 percent of the total number of dump truck carriers holding permits from this Commission. The LCS will contain an abundance of relevant data once the erroneous Baldwin data is

excised. Furthermore, no evidence has been adduced by CPIL or any other party, other than the information pertaining to Baldwin, that the data contained in the revised staff exhibits are unreliable. In the circumstances the appeal by CPIL will be denied, with a concurrent direction to the staff to again revise the appropriate exhibits by excluding the Baldwin data.

Petition to Set Aside Submission

On April 8, 1988 Yuba filed its Petition to Set Aside Submission of OSH 325, Phase 1B, and Three Related Matters, and to reopen the proceeding for the taking of additional evidence.

Phase 1-B of this consolidated proceeding concerns the establishment of rules and cost-gathering methodologies for construction related commodities. Phase 1-B will stand submitted upon the filing of briefs on September 15, 1988.

Yuba asserts, as justification in support of its petition, the following:

1. There has been placed on the Commission's calendar a motion for a 5% increase in the three MRT's naming rates for transportation performed in dump truck equipment.
2. CPIL filed an appeal from the ALJ ruling on its motion to exclude certain LCS data.
3. Yuba has filed several petitions for modification of earlier decisions on methodologies and rules.
4. En Banc hearings on transportation regulation have been completed.

Yuba believes a decision on Phase 1-B is inappropriate at this time because of the potential effect of the above mentioned filings and/or the decision of the Commission as a result of the transportation en banc proceeding.

Yuba proposes that Phase 1-B, the motion by CDTOA/CCA for a 5% increase, the CPIL appeal of the ALJ's ruling on the labor cost study, and its own several petitions for modification of the

cost methodology decision issued in this proceeding (D.86-08-030) and the rules decision (D.87-05-036) be set aside pending the taking of evidence and a decision on a new rate deviation procedure. Yuba asserts that OSH 325 is hopelessly bogged down because it is impossible to develop an effective system of minimum rate regulation for the dump truck industry, and because the absence of a functional rate deviation procedure creates an impossible demand for a system of accurate costs, valid formulas, sensible rules, adequate enforcement and sound decisions. Yuba intimates that if a functional rate deviation process is established, much of the opposition to the rules and procedures under consideration in OSH 325 could be eliminated. Yuba also professes that if an effective rate deviation procedure cannot be developed, then rate deregulation may be the only way to satisfy the need for greater rate flexibility.

Replies to Yuba's petition to Set Aside Submission were filed by CDTOA/CCA, by CTA and by the staff. CDTOA/CCA argues that the Yuba petition is improper since the subject of deviations was not even before the Commission in the Phase 1-B hearings; and further, that Rule 84 is not a rule which should allow a party to unilaterally cause a proceeding to be reopened when that party had opportunity to present such evidence, but chose not to do so.

CTA urges that we not grant the Yuba petition to set aside submission because D.87-05-036 contemplated and directed that deviation procedures would be considered in Phase 2 of this proceeding.

Staff states that consideration of the deviation procedure is vital, and that it has developed a recommended deviation procedure, but that consideration thereof need not be made prior to issuance of the decision on Phase 1-B.

Both CDTOA/CCA and CTA are correct in their arguments concerning this petition by Yuba. D.87-05-036 directed in Ordering Paragraph 2 that further evidence in connection with OSH 323 issues

would be considered in Phase 2. Conclusion of Law 2 of D.87-05-036 indicated that the issue of deviation procedures would be included in the OSH 323 portion of the proceeding, and would be considered in Phase 2.

Furthermore, the events cited by Yuba do not constitute, individually or collectively, valid reason to set aside submission of Phase 1-B of this proceeding. The request for a 5% increase, if granted, will have no bearing upon the methodology issues considered in Phase 1-B.

The appeal of the CPIL from the ALJ's ruling on its motion regarding the LCS is being denied by this decision.

Yuba has included in its Petition To Set Aside Submission a request that the CPIL appeal from the ALJ ruling on the LCS be set aside, even though it also filed on the same date, April 8, 1988, a pleading in support of the CPIL appeal. The Yuba petition even includes a proposal that its own petitions for modification of D.86-08-030 and D.87-05-036 be set aside. There is no valid reason to set aside submission of Phase 1-B in these confused circumstances.

We hereby notice the parties that appeals from rulings of the presiding officer and petitions for modification of our decisions, in an ongoing matter, will not be routinely entertained by the Commission. This proceeding has become, in our view, unnecessarily protracted. OSH 325 was issued based upon the assumption that there was sufficient unanimity among representative parties within the industry to enable the expeditious development and establishment of costs and resultant rates, as well as rules. This assumption is apparently no longer true. In particular, CPIL and Yuba are bringing the perspectives of consumers and of a more competitively-oriented trucking firm into a proceeding that had formerly emphasized the views of our staff and of the industry. While we acknowledge that this intervention has created some procedural and substantive confusion, we welcome the participation

of the type of consumer representatives whose presence is an integral part of our process in every other industry we oversee. In the final analysis, our primary legal and regulatory responsibility is to protect consumer interests.

There is no reason to set aside submission of Phase 1-B until after a deviation procedure is adopted. Such setting aside would accomplish nothing. This consolidated proceeding was established for the purpose of "considering methods and procedures through which more effective dump truck rate policy can be established, administered, and tested in practice for an interim period." The ongoing deviation hearings mark the initiation of Phase 2 of this proceeding.

We share some of Yuba's frustration at the slow pace of this proceeding. We also recognize that the staff's labor cost study suffers deficiencies that would make it unsuitable for rate-setting purposes, especially considering the standard of evidence and proof we ordinarily require before authorizing rate increases for non-transportation utilities. However, we do not want to criticize staff for carrying out our directions although the product may not have application beyond its intended use. As we have stated, we will authorize the use of the study only for the limited purpose of setting territorial boundaries.

We are sympathetic to some of the objectives that Yuba has outlined in filing its many petitions. In some of these pleadings, we recognize a certain common sense approach to a number of vexing issues. However, at this stage of the proceeding we would rather place our hopes on the development of an expeditious deviation procedure rather than to reconsider a number of methodologies or data that have previously been developed. Testimony at our en banc hearing pointed out the need the industry has to obtain timely and reasonably assured deviations in order to respond quickly to competitive conditions; in practice, a delay often amounts to the same thing as a denial. While we are denying

Yuba's petition to set aside, we wish to encourage Yuba and others to devote their efforts to designing the deviation procedure, which we now set as the highest priority for this proceeding.

Findings of Fact

1. CPIL has filed an appeal from the assigned ALJ's ruling on its motion to exclude certain exhibits relating to information contained in the staff-conducted LCS.
2. The LCS reflected in revised Exhibits 59 and 60 contains substantial incorrect data due to the inclusion of labor costs from Baldwin.
3. If the Baldwin data is excised from revised Exhibits 59 and 60, the resultant exhibits will contain information which is relevant, usable, and reliable only for the limited purpose of establishing territorial boundaries in MRT 7-A.
4. Yuba has petitioned the Commission to set aside Phase 1-B of this proceeding, as well as consideration of the 5% increase request sought by CDTOA/CCA, the CPIL appeal from the ALJ's ruling on the revised LCS exhibits, and Yuba's own petitions for modification of D.86-08-030 and D.87-05-036 pending the taking of evidence and a decision on a new rate deviation procedure.
5. D.87-05-036 directed that deviation procedures would be considered in Phase 2 of this proceeding.
6. The events cited by Yuba in its Petition to Set Aside Submission do not constitute, individually or collectively, cause to grant Yuba's petition.

Conclusions of Law

1. The appeal by CPIL of the ALJ's ruling on its motion to exclude various exhibits relating to the staff-conducted LCS should be denied, with a concurrent direction to the staff to prepare revised Exhibits 59 and 60 which do not contain the Baldwin data referred to in this decision.
2. Yuba's Petition to Set Aside Submission should be denied.

ORDER

IT IS ORDERED that:

1. The appeal filed by the Center for Public Interest Law is denied.
2. The Transportation Division staff shall prepare, as soon as possible, and furnish all parties with revised Exhibits 59 and 60 which do not contain the data received from Baldwin Contracting Company referred to in this decision.
3. The Petition to Set Aside Submission filed by Yuba Trucking, Inc. is denied.

This order is effective today.


Dated August 24, 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I will file a concurring opinion.

/s/ DONALD VIAL
Commissioner

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Victor Weisser, Executive Director

CONCURRING STATEMENT OF COMMISSIONER DONALD VIAL:

I support the outcome of this decision, but I would have preferred some "balancing" modifications to Commissioner Wilk's changes adopted in the decision on pages 7-9. My preferred modifications are as follows.

At the bottom of pages 7 and continuing on page 8, the majority manages in one sentence to link the advocacy of consumer perspectives in trucking with the advocacy of a "competitively oriented" trucking firm that supports deregulation -- naming the two advocates as CPIL and Yuba -- and then combines this "consumer" linkage with a call for more consumer participation in trucking matters. I find that to be a sentence with an axe to grind. Like the majority, I favor more participation of ultimate consumers and their legitimate representatives in our transportation proceedings, including dump truck proceedings. I think we could have provided the encouragement with less bias -- intended or otherwise -- with the substitute language which I proposed:

"In particular, we welcome the participation of consumer representatives whose focus is on the impact of trucking decisions on the ultimate consumer. In the final analysis, our legal and regulatory responsibility is to protect consumer interests in addition to providing a reliable trucking infrastructure. We should do so, however, based on a solid analysis and understanding of how the product markets of shippers and other users of transportation services affect or impact the interests of consumers of products that have trucking costs built into them"

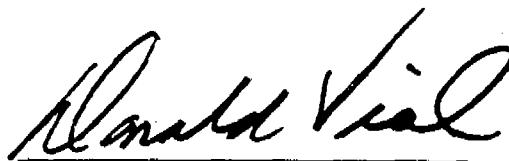
On page 8, at the beginning of the second full paragraph, reference is made by the majority to "sharing" some of Yuba's frustrations at the "slow pace of this proceeding". I find that paragraph and subsequent references to deficiencies of staffs' labor cost studies as pushing again in the same direction of linking consumers' interests to those advocated by Yuba and CPIL. The paragraph fails to recognize that Yuba has specific interests as a dump truck carrier with heavy reliance in its business operations on the renting of trailers to owner-operators who "pull" exclusively for Yuba, probably without workers compensation coverage by Yuba. I would not want the "sharing" of some of Yuba's procedural frustrations to imply in anyway that we embrace its competitive mode of operation, especially when the "competitive" cost of workers compensation may be getting swept under the rug. These also are arguable issues that need to enter this proceeding.

I would prefer the retention of the ALJ's paragraph that was deleted by the majority:

"Yuba's belief that this proceeding is hopelessly bogged down is apparently unique; we are aware of no other party holding this view. It would be unwarranted, based upon the pleading of a single party, to set aside submission of a proceeding involving significant time and expense by numerous participants without a substantial indication of some egregious effect if the petitioner's request is not granted. Such a showing has not been demonstrated by Yuba. The petition to set aside submission will be denied".

Also I would change the first sentence of the last paragraph on page 8 to read: "We understand the interests and the objectives that are reflected in Yuba's filings of its many petitions". At the same time I believe, like the majority, that the proceeding needs to move ahead expeditiously. In this regard, I have no problems with the majority's language, adopted from Commissioner Wilk's alternate, that does not mix priorities and due process with what appears to be regulatory policy objectives in the dump truck industry.

Finally, I would change the last sentence in the paragraph before the Findings of Fact on pages 8 and 9 to read: "While we are denying Yuba's petition to set aside, we wish to encourage Yuba and others to devote their efforts to examining the adequacy of our present deviation procedures, which has high priority in phase 2 of this proceeding".

A handwritten signature in cursive script that reads "Donald Vial". The signature is written in dark ink and is positioned above a horizontal line.

Donald Vial, Commissioner

August 24, 1988
San Francisco, California

would be considered in Phase 2. Conclusion of Law 2 of D.87-05-036 indicated that the issue of deviation procedures would be included in the OSH 323 portion of the proceeding, and would be considered in Phase 2.

Furthermore, the events cited by Yuba do not constitute, individually or collectively, valid reason to set aside submission of Phase 1-B of this proceeding. The request for a 5% increase, if granted, will have no bearing upon the methodology issues considered in Phase 1-B.

The appeal of the CPIL from the ALJ's ruling on its motion regarding the LCS is being denied by this decision.

Yuba has included in its Petition To Set Aside Submission a request that the CPIL appeal from the ALJ ruling on the LCS be set aside, even though it also filed on the same date, April 8, 1988, a pleading in support of the CPIL appeal. The Yuba petition even includes a proposal that its own petitions for modification of D.86-08-030 and D.87-05-036 be set aside. There is no valid reason to set aside submission of Phase 1-B in these confused circumstances.

We hereby notice the parties that appeals from rulings of the presiding officer and petitions for modification of our decisions, in an ongoing matter, will not be routinely entertained by the Commission. This proceeding has become, in our view, unnecessarily protracted. OSH 325 was issued based upon the assumption that there was sufficient unanimity among representative parties within the industry to enable the expeditious development and establishment of costs and resultant rates, as well as rules. We will expect to see the early completion of the remainder of the studies and hearings necessary to bring about the final establishment of those rates and rules.

There is no reason to set aside submission of Phase 1-B until after a deviation procedure is adopted. Such setting aside would accomplish nothing. This consolidated proceeding was

established for the purpose of "considering methods and procedures through which more effective dump truck rate policy can be established, administered, and tested in practice for an interim period." The ongoing deviation hearings mark the initiation of Phase 2 of this proceeding.

Yuba's belief that this proceeding is hopelessly bogged down is apparently unique; we are aware of no other party holding this view. It would be unwarranted, based upon the pleading of a single party, to set aside submission of a proceeding involving significant time and expense by numerous participants without a substantial indication of some egregious effect if the petitioner's request is not granted. Such a showing has not been demonstrated by Yuba. The petition to set aside submission will be denied.

Findings of Fact

1. CPIL has filed an appeal from the assigned ALJ's ruling on its motion to exclude certain exhibits relating to information contained in the staff-conducted LCS.
2. The LCS reflected in revised Exhibits 59 and 60 contains substantial incorrect data due to the inclusion of labor costs from Baldwin.
3. If the Baldwin data is excised from revised Exhibits 59 and 60, the resultant exhibits will contain information which is relevant, usable, and reliable for the purpose of establishing territorial boundaries in MRT 7-A.
4. Yuba has petitioned the Commission to set aside Phase 1-B of this proceeding, as well as consideration of the 5% increase request sought by CDTOA/CCA, the CPIL appeal from the ALJ's ruling on the revised LCS exhibits, and Yuba's own petitions for modification of D.86-08-030 and D.87-05-036 pending the taking of evidence and a decision on a new rate deviation procedure.
5. D.87-05-036 directed that deviation procedures would be considered in Phase 2 of this proceeding.

6. The events cited by Yuba in its Petition to Set Aside Submission do not constitute, individually or collectively, cause to grant Yuba's petition.

Conclusions of Law

1. The appeal by CPIL of the ALJ's ruling on its motion to exclude various exhibits relating to the staff-conducted LCS should be denied, with a concurrent direction to the staff to prepare revised Exhibits 59 and 60 which do not contain the Baldwin data referred to in this decision.

2. Yuba's Petition to Set Aside Submission should be denied.

ORDER

IT IS ORDERED that:

1. The appeal filed by the Center for Public Interest Law is denied.

2. The Transportation Division staff shall prepare, as soon as possible, and furnish all parties with revised Exhibits 59 and 60 which do not contain the data received from Baldwin Contracting Company referred to in this decision.

3. The Petition to Set Aside Submission filed by Yuba Trucking, Inc. is denied.

This order is effective today.

Dated AUG 24 1988, at San Francisco, California.

STANLEY W. HULETT
President

DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I will file a concurring opinion.

DONALD VIAL
Commissioner